

SENATE BILL REPORT

HB 2719

As Reported By Senate Committee On:
Judiciary, February 29, 2008

Title: An act relating to ensuring that offenders receive accurate sentences.

Brief Description: Ensuring that offenders receive accurate sentences.

Sponsors: Representatives Priest, Hurst, Loomis and VanDeWege.

Brief History: Passed House: 2/12/08, 96-1.

Committee Activity: Judiciary: 2/29/08 [DPA].

SENATE COMMITTEE ON JUDICIARY

Majority Report: Do pass as amended.

Signed by Senators Kline, Chair; Tom, Vice Chair; McCaslin, Ranking Minority Member; Carrell, Hargrove, McDermott, Roach and Weinstein.

Staff: Robert Kay (786-7405)

Background: Under the Sentencing Reform Act (SRA), the prosecutor has the burden of proving an offender's criminal history to the court by a preponderance of the evidence. An offender's criminal history is used for a variety of purposes, including calculating the offender's standard sentence range, and determining whether the offender is a persistent offender under the three strikes and two strikes laws.

Because of the importance of an offender's criminal history for purposes of sentencing, there are many cases determining how and when an offender may appeal the calculation of his or her criminal history. For example, in *State v. Ford*, 137 Wn.2d 472 (1999), the Washington Supreme Court ruled that a defendant's failure to object to offenses included in his or her criminal history at sentencing did not waive the defendant's ability to raise the issue on appeal. The Washington Supreme Court indicated that the defendant is not obliged to disprove the state's position until the state has met its primary burden of proof.

In *State v. Lopez*, 147 Wn.2d 515 (2002), the Washington Supreme Court ruled that the prosecution may not, in a resentencing hearing, introduce evidence to prove the existence of prior convictions when the defendant objected to the existence of the prior convictions at trial, and the issue was argued at sentencing. Similarly, in *In re the Personal Restraint of Cadwallader*, 155 Wn.2d 867 (2005), the Washington Supreme Court ruled that the prosecution may not, on collateral review, introduce evidence to prove the existence of prior convictions that were not alleged at the original sentencing. The court also ruled that the

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

defendant's acknowledgment of his or her criminal history at sentencing did not waive the defendant's ability to raise the issue on appeal.

Summary of Bill (Recommended Amendments): In a sentencing hearing, a criminal history summary relating to the defendant from the prosecuting authority or from a state, federal, or foreign governmental agency is prima facie evidence of the existence and validity of the convictions listed. Prior convictions that were not included in the criminal history of the defendant or not considered in the offender score calculation at the first sentencing hearing must be included upon any resentencing to ensure imposition of an accurate sentence. The defendant will be deemed to have acknowledged the defendant's criminal history in the absence of any objection to the criminal history at the sentencing hearing. On remand for resentencing following an appeal of, or collateral attack on, the judgment, the parties must have the opportunity to present, and the court may consider, all relevant criminal evidence regarding criminal history, including criminal history not previously presented. Existing supervision provisions of the Sentencing Reform Act are technically reorganized and simplified with no substantive change to the SRA.

EFFECT OF CHANGES MADE BY JUDICIARY COMMITTEE (Recommended Amendments): A technical and organizational change to the supervision provisions of the Sentencing Reform Act (SRA) simplifies these provisions. Post-incarceration supervision is defined as "community custody," eliminating all other terms. The conditions of community custody are consolidated in one section of the SRA. The current SRA applies to all offenders sentenced after the effective date of the reorganized sections created by the amendment. Obsolete provisions, including definitions of community supervision, community placement, and post-release supervision, are moved to a separate chapter. The process of sentencing pre-OAA offenders to whom the obsolete forms of supervision, community placement and community supervision, apply is changed. The effective date for the reorganizing provisions is provided to allow the Code Reviser to recommend to the 2009 Legislature any further necessary amendment.

Appropriation: None.

Fiscal Note: Not requested.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony: PRO: Existing law requires a defendant to object to the state's version of the defendant's criminal history in order to force the state to produce admissible evidence of the defendant's prior convictions, such as copies of the judgment and sentence. Criminal history summaries are utilized routinely at sentencing to establish a defendant's criminal history and offender score. The production of a summary of the defendant's criminal history should be considered sufficient evidence of the defendant's prior convictions to require the defendant to make an objection if there is an error, in order to put the state to its burden to produce admissible evidence in the form of a judgment and sentence to prove the existence of the prior convictions, and to preserve the defendant's right to appeal the sentencing on the grounds of incorrect offender score. The State should be allowed, at any resentencing, to prove prior convictions that were not included in the defendant's offender

score at the original sentencing. It may be true, however, that section 2 of the bill puts an unfair burden on the defendant at sentencing to prove the defendant's criminal history, and thus it would be reasonable to delete section 2 by amendment to the bill.

The technical changes made to reorganize and simplify the SRA were drafted by a subcommittee of the Sentencing Guidelines Commission. The supervision provisions of the SRA have become confusing due to incremental changes by the Legislature to the statutory scheme over the years. Few people in the field of criminal justice understand the supervision provisions of the SRA. Substantive changes to the supervision provisions of the SRA will be taken up by the next session of the Legislature. No substantive changes to the SRA are made here. This bill only makes technical, organizational changes to the SRA to make easier future substantive amendments to the supervision provisions.

CON: Accuracy in sentencing is not achieved by relaxing the standards of proof. Even if section 2 of the bill is deleted by amendment, the standards of proof the State must meet are relaxed by this bill. The bill contains substantial constitutional infirmities and creates numerous practical problems. To meet the requirements of due process at sentencing the state must stand ready to prove, with admissible evidence, the prior convictions of the defendant. Bare assertions by the State contained in a criminal history summary, assertions that the State is not prepared to prove, do not rise to the level of due process. It is not true that current law requires any objection by the defendant before the State has the burden of producing proof beyond a summary of the defendant's convictions. Current law also allows the defendant to appeal a sentencing on grounds of an incorrect offender score even if the defendant made no objection at the sentencing hearing, and only requires an objection by the defendant at sentencing for the defendant to preserve a certain appellate remedy. This bill would allow the bare assertions of criminal history to suffice as proof of the defendant's prior convictions, something the Washington supreme court has rejected as a violation of due process. Thus, this bill is going to run afoul of the court's holdings that due process requires more.

Persons Testifying: PRO: Tom McBride, Washington Association of Prosecuting Attorneys; Seth Fine, Snohomish County Prosecuting Attorney.

CON: Gregory Link, Washington Association of Criminal Defense Lawyers & Washington Defender Association.